IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0516

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NIEL KELLY MULLARKEY,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUES

1. Did Mullarkey fail to present the Court with a record sufficient to enable it to rule on the district court's determination that Mullarkey was competent to stand trial?

2. Did the district court correctly deny Mullarkey's motion to dismiss where Mullarkey acquiesced in the pretrial competency evaluation ordered at Montana State Hospital pursuant to Mont. Code Ann. § 46-14-202, and the nature and duration of the evaluation was rationally related to its legitimate purpose?

3. Did the district court enter a legal sentence within statutory parameters, where Mullarkey did not claim he was suffering from a mental disease or defect and Mont. Code Ann. §§ 46-14-311 and -312 were not applicable?

STATEMENT OF THE CASE AND OF THE FACTS

After a two-day trial, the jury entered verdicts of guilty against Appellant Niel Kelly Mullarkey (Mullarkey), convicting him of three counts of felony assault on a peace officer and one count of misdemeanor obstructing a peace officer. (D.C. Docs. 72, 74, 78, 98; Tr. Vol. II at 255-56;[1] see D.C. Doc. 2.) Mullarkey

[1] References to the transcripts of the trial and proceedings on February 17 and 18, 2009, will be by roman numeral; other transcripts will be referenced by date.

raises no challenge on appeal to the evidence against him, or to any other component of the trial.

The evidence presented at trial established that Mullarkey had gone to a Town Pump station in Helena to buy gasoline for his pickup truck. (Tr. Vol. I at 124, 126.) Mullarkey tried to pay with a check, but the clerk would not accept the check without proper identification, such as a driver's license, which Mullarkey did not have with him. (Tr. Vol. I at 129.) Mullarkey became agitated, upset, and threatening towards the clerk, who called the police. (Tr. Vol. I at 129-31, 133-34, 152.) After responding and diffusing the situation, the police cited Mullarkey with theft and assault, and told him to leave the premises and not come back except to pay for the gas. (Tr. Vol. I at 137, 154-60.)

Mullarkey left his truck there overnight and returned the next morning. (Tr. Vol. I at 137, 160, 183-85.) Rather than try to work out payment for the $75 he owed, Mullarkey got mad at the clerk and stormed out to his truck, fully expecting the police to arrive. (Tr. Vol. I at 185-86; Tr. Vol. II at 202-05.) The manager tried to get Mullarkey to just pay for the gas and be on his way, to no avail, and then he called 9-1-1. (Tr. Vol. I at 187, 200-02.)

Based on the prior night's incident, the officers on shift had been briefed and cautioned about Mullarkey's behavior. (Tr. Vol. I at 164, 217-18; Tr. Vol. II at 93, 134.) Four officers, including a K-9 unit, responded to find Mullarkey lying

in the back of his open pickup bed. (Tr. Vol. I at 188, 218-21; Tr. Vol. II at 135, 137.) The officers informed Mullarkey that he was under arrest for trespassing and ordered him to get out of the truck. (Tr. Vol. I at 225.) Mullarkey refused, telling the officers, "I'm not going to jail." (Tr. Vol. II at 96-97, 139-40, 229-30.) Then Mullarkey pulled out a knife and held it out towards the officers in a threatening manner, which Mullarkey testified meant "stay away." (Tr. Vol. I at 226-27; Tr. Vol. II at 99, 140-41, 155, 206-07, 228.) Mullarkey's brandishing the knife and his refusal to comply with orders, caused the officers to be fearful and apprehensive that they would be seriously injured or killed--"He could have stabbed us. He could have cut us. He could have killed one of us." (Tr. Vol. I at 227, 237; Tr. Vol. II at 98-99, 107, 148.) After repeated orders to submit and multiple Taser shocks to Mullarkey, he finally dropped the knife, got out of the truck, and was subdued by the officers in the parking lot. (Tr. Vol. I at 227-34; Tr. Vol. II at 99-104, 141, 146, 149-51.)

Mullarkey Was Found Competent to Stand Trial

After his arrest and before trial, there were questions raised regarding Mullarkey's competence to stand trial due to mental health issues. Despite the issue of Mullarkey's mental health and fitness to proceed raised in this proceeding, Mullarkey himself never claimed that he suffered from a mental illness, disease, or defect, and consistently disputed any such claim or diagnosis by others. (See, e.g.,

D.C. Docs. 8 at 3, 35 at 3-4, 37 at 4-5, 86; 5/11/09 Tr. at 8-9, 60, 64, 68.) Mullarkey gave no notice of any defense relating to mental disease, defect, or illness. (See D.C. Doc. 13.) In addition, as even Mullarkey has conceded, the district court never determined that Mullarkey was unfit or not competent to stand trial because of mental illness, disease, or defect. (See, e.g., D.C. Docs. 61 at 2, 4, 83 at 5; 1/12/09 Tr. at 12; 5/11/09 Tr. at 4-5; see also Br. of Appellant at 4.)

The first mention in the record that Mullarkey's mental health or competence was in question was in a motion to continue trial, filed by his attorney, Kristina Neal, for the purpose of assessing those issues. (D.C. Doc. 17.) According to a later-filed "initial assessment" from the Montana State Hospital, after Neal requested a psychological examination, Mullarkey went on "hunger strike" at the jail and was transported to Montana State Hospital on emergency detention from June 6 to 9, 2008. (D.C. Doc. 29 at 6.) After his release and pursuant to Neal's request, Mullarkey underwent a forensic psychological evaluation with clinical psychologist Dr. Dean Gregg to determine Mullarkey's competence to stand trial. (D.C. Docs. 29 at 7-9, 34.)

Dr. Gregg reviewed available information regarding Mullarkey's history and current situation, talked with friends and relatives, and interviewed Mullarkey. (D.C. Doc. 34 at 1-5.) Dr. Gregg analyzed Mullarkey's competence under the statute, Mont. Code Ann. § 46-14-103 (unfitness based on inability to understand

proceedings or assist in defense as a result of mental disease or defect), and related elements and guidelines. (D.C. Doc 34 at 5-6.)

Dr. Gregg noted Mullarkey's poor cooperation with the evaluation and the fact that his thinking was "inflexible and at times, illogical." (D.C. Doc. 34 at 4, 6.) However, Mullarkey undoubtedly understood his situation and appreciated the seriousness of the charges; he was aware of the main actors and their roles; and he was able to provide relevant facts, was familiar with the evidence, and pointed out errors or misstatements of fact in the allegations. (D.C. Doc. 34 at 6.) It appeared that Neal's referral for evaluation caused some strain and lack of trust in the relationship--Mullarkey seemed not to trust Neal's legal judgment and viewed her as attempting to thwart his wishes. (D.C. Doc. 34 at 6.) According to Dr. Gregg, "This is not to say that you cannot continue to work together, but it may be awkward at times." (D.C. Doc. 34 at 6.)

Dr. Gregg reflected that it was not uncommon to see defendants with rigid philosophies similar to Mullarkey's--"I'm innocent; the constitution gives me the right to defend my truck"--who are allowed to proceed to trial. (D.C. Doc. 34 at 6.) However, the dilemma was whether Mullarkey's reasoning was the product of a serious mental disorder, especially given reports from credible individuals to the effect that Mullarkey may have significant psychological problems, based on a

psychiatric hospitalization in the past and the impact of his wife's suicide in 2001. (D.C. Doc. 34 at 2-3, 5, 6.)

Despite these concerns, Dr. Gregg concluded that he did not have enough information to form an opinion as to competence and recommended, if Neal wished to pursue the issue, that Mullarkey be transferred to the State Hospital for evaluation of his fitness to proceed. (D.C. Doc. 34 at 7.) Dr. Gregg noted, "The Court should be aware that Mr. Mullarkey will undoubtedly be opposed to this." (D.C. Doc. 34 at 7.)

Following Dr. Gregg's report, Jon Moog was substituted as counsel for Mullarkey (D.C. Doc. 19), and he filed unopposed motions for a competency evaluation and to transport Mullarkey to the Montana State Hospital on July 29, 2008, for that purpose. (D.C. Docs. 20, 21.) The defense motion cited Mont. Code Ann. § 46-14-221, but expressly requested Mullarkey be admitted to the State Hospital "for a complete competency evaluation."[2] (D.C. Doc. 20.) The district court granted the motions and ordered the competency evaluation and transport. (D.C. Docs. 22, 23.) The form of order signed by Judge Honzel cited the same statute as the defense motion. (D.C. Doc. 22.)

[2] Later, in its proposed findings of fact submitted to the district court regarding the issue of Mullarkey's competency, the defense would represent that Mullarkey was placed at the Montana State Hospital for "observation and evaluation pursuant to Section 46-14-201 et seq., MCA." (D.C. Doc. 35 at 2.)

Mullarkey was admitted to the State Hospital on July 30, 2008. (D.C. Doc. 29 at 1.) Shortly thereafter, the defense moved to continue the trial date then set for August 18 "for a period of three months as the Defendant is undergoing evaluation and potential treatment to address fitness to proceed. It is expected the Defendant will remain hospitalized for up to 90 days." (D.C. Doc. 24.)

The State Hospital staff, Dr. John Van Hassel and Dr. Virginia Hill, filed their report with the district court on October 7, 2008 (69 days after admission), and the district court provided copies to the parties. (D.C. Docs. 26, 27, 28.) The report was mistaken that Mullarkey had been adjudicated unfit to proceed and was committed pursuant to Mont. Code Ann. § 46-14-221. (D.C. Doc. 28 at 3; see D.C. Doc. 83 at 5; 5/11/09 Tr. at 4-5.) The report concluded, in the opinion of Drs. Van Hassel and Hill, with a diagnosis that Mullarkey suffered from a mental disease or defect, specifically paranoid schizophrenia. (D.C. Doc. 28 at 10-12.) Mullarkey, however, was in complete denial of having a mental illness, adamantly opposed medication intervention, and refused inpatient treatment in any meaningful way. (D.C. Doc. 28 at 11.)

Although Mullarkey refused to cooperate and participate in the formal competency assessment and interview (D.C. Doc. 28 at 7-8), the doctors concluded that Mullarkey remained "unable to adequately understand the charges against him and unable to participate meaningfully in his own defense" and that his "failure to

fully cooperate with competency assessment procedures is largely the product of his Paranoid Schizophrenia." (D.C. Doc. 28 at 11-12.) Despite that finding, the doctors were "unable to assess his current competency in detail," but they did conclude his understanding of basic legal procedures and rights was likely intact. (D.C. Doc. 28 at 8.)

Mullarkey's day-to-day behavior at the State Hospital was "not problematic," and he seemed to prefer it to being in jail. (D.C. Doc. 28 at 5-6.) The doctors reported Mullarkey "appeared to have no difficulty adjusting to the ward environment and said he liked the food and reduced noise better here than in jail." (D.C. Doc. 28 at 5.) In addition:

> He has presented no management problems on the ward, has been cooperative with staff direction during daily activities, and has been generally polite and reserved when interacting with staff. He has had no difficulty managing basic self-care tasks, his appetite has been good, and his sleep patterns have been normal. He socializes with certain select other patients, but appears very reluctant to discuss any personal information. His concentration appears adequate to allow him to focus on common activities like watching television or reading.

(D.C. Doc. 28 at 5-6.)

On October 27, 2008 (89 days after admission to the State Hospital), the attorneys for the State and Mullarkey appeared for an omnibus hearing, the State advised that Mullarkey was unfit to proceed, and the court scheduled a hearing on the matter. (D.C. Doc. 30.) Nothing in the record indicates that Mullarkey

objected at that time to the duration or continuation of the competency evaluation at the Montana State Hospital.

On November 5, 2008, (98 days after admission to the State Hospital), Mullarkey appeared before the district court for a hearing on "commitment." (D.C. Doc. 33.) The minutes reflect that Dr. Hill testified via videoconference from the State Hospital; the court received Dr. Gregg's report; and Mullarkey was sworn and testified. (D.C. Doc. 33.) Nothing in the record indicates that Mullarkey objected at that time to the imposition, conduct or duration of the competency evaluation at the Montana State Hospital. (See, e.g., D.C. Doc. 35.)

Following the hearing, and having before it the State's and Mullarkey's proposed findings of fact and conclusions of law (D.C. Docs. 35, 36), the district court determined that Mullarkey was competent and fit to proceed to trial. (D.C. Doc. 37; see also D.C. Doc. 98 at 1-2.) In recognition of the expert testimony, the district court concluded, "He may very well suffer from a mental illness, but that does not necessarily mean he is unfit to proceed." (D.C. Doc. 37 at 5.) The district court's order sets forth detailed findings of fact, including the following consistent with Mullarkey's proposed findings:

> 15. Mullarkey testified he does not suffer from a mental illness. He is opposed to being involuntarily medicated. He expressed his concerns about the side affects [sic] of antipsychotic medication, and he stated he would consider it an assault if someone tried to involuntarily medicate him.

16. Mullarkey appears to be of at least average intelligence. He is aware of the seriousness of the charges against him, and he has an adequate understanding of the court proceedings. He does not believe he is guilty and wants to go to trial.

17. Although he had problems with his previous attorney, Mullarkey did not express dissatisfaction with his current attorney. Mullarkey stated he could assist his attorney with his defense.

(D.C. Docs. 35 at 3, 37 at 4-5.) There is no transcript of the November 5, 2008 hearing included in the record on appeal. (See D.C. Doc. 100.)

Mullarkey's Motion to Dismiss

Finally, over a month after the competency hearing and order on fitness to proceed, Mullarkey moved to dismiss the charges against him on the grounds that his "commitment" in the Montana State Hospital for the purposes of evaluating his competency violated statutory procedures--Mont. Code Ann. § 46-14-202(2)--and his right to due process. (D.C. Docs. 53, 54.) Upon briefing and argument on the record (D.C. Docs. 54, 56, 59; 1/12/09 Tr. at 1-14), the district court, the Honorable Kathy Seeley presiding (Judge Seeley), denied Mullarkey's motion to dismiss. (D.C. Doc. 61.)

The district court reasoned that the sole authority cited by Mullarkey for dismissal was a case, State v. Tison, 2003 MT 342, 318 Mont. 465, 81 P.3d 471, limited to the situation where a court has determined the defendant lacks fitness to proceed and, after a 90-day commitment and treatment period, dismissal is required by Mont. Code Ann. § 46-14-221 if it does not appear that fitness can be

restored. (D.C. Doc. 61 at 3-4.) The district court found that authority to be inapplicable, because the district court had never made a finding that Mullarkey was unfit to proceed in this case. (D.C. Doc. 61 at 4.) Mullarkey had, otherwise, provided no authority requiring dismissal of the charges. The case proceeded to trial and the jury found Mullarkey guilty as charged. (See Tr. Vol. I and II.)

Sentencing

Pursuant to the presentence investigation report (PSI) (D.C. Doc. 83) and the evidence and argument presented at the sentencing hearing (5/11/09 Tr. at 1-70; D.C. Docs. 86, 87, 88), Judge Seeley sentenced Mullarkey to three two-year commitments to the Montana Department of Corrections (DOC) for the felony counts and six months in the Lewis & Clark County Jail for the misdemeanor, all concurrent. (D.C. Doc. 98 at 3; 5/11/09 Tr. at 68-69.) The district court granted Mullarkey credit for 415 days from his arrest on March 22, 2008, through the date of sentencing, May 11, 2009. (D.C. Doc. 98 at 3; 5/11/09 Tr. at 69.) The district court also required Mullarkey to register as a violent offender, as required by statute. (D.C. Doc. 98 at 3; 7/9/09 Tr. at 12-13.)

Mullarkey did not, either in his sentencing memorandum or at the hearing, raise, or object in any way, that he should be sentenced in accordance with Mont. Code Ann. § 46-14-311 and -312 due to a mental illness, disease, or defect. (D.C. Doc. 86; 5/11/09 Tr. at 62-68.) In fact, he expressly disputed the diagnosis of

paranoid schizophrenia. (5/11/09 Tr. at 64.) Mullarkey appealed. (D.C. Doc. 101.)

SUMMARY OF THE ARGUMENT

Mullarkey's three assignments of error are without merit. First, Mullarkey has not presented a record on appeal sufficient for this Court to review the district court's conclusion that Mullarkey was competent to proceed to trial--a determination Mullarkey advocated at trial but now challenges for the first time on appeal. There is no transcript of the November 5, 2008 fitness hearing in the record on appeal; therefore, Mullarkey breached his duty to present a sufficient record under the rules of appellate procedure.

Second, Mullarkey was not entitled to dismissal of the charges against him because of the court-ordered competency evaluation at the Montana State Hospital. Mullarkey acquiesced in the evaluation, and its nature and duration were rationally related to its purpose and need--to determine Mullarkey's fitness to proceed to trial, particularly given his refusal to cooperate or participate in the evaluation. Mullarkey must concede under the circumstances, as he argued below, the proper statutory basis for the evaluation was Mont. Code Ann. § 46-14-202, rather than § 46-14-221. As permitted under the former statute, it would appear that a period longer than 60 days was reasonably necessary in this case and the district court's

order--by implication and Mullarkey's acquiescence--should be sufficient. Therefore, the evaluation did not violate either the statute or Mullarkey's right to due process and dismissal of the charges would be inappropriate.

Third, at sentencing Mullarkey and his counsel continued to disclaim and dispute any allegations or diagnosis of mental illness, consistent with Mullarkey's position throughout the proceedings. Mullarkey's sentence, therefore, was legal and within statutory parameters without application of Mont. Code Ann. §§ 46-14-311 and -312.

ARGUMENT

I. MULLARKEY FAILED TO PRESENT A RECORD ON APPEAL SUFFICIENT FOR THIS COURT TO RULE ON THE DISTRICT COURT'S DETERMINATION THAT MULLARKEY WAS COMPETENT TO STAND TRIAL.

A. Standard of Review

This Court reviews a court's finding of competence to determine whether substantial evidence supports the finding. In re G.T.M., 2009 MT 443, ¶ 9, 354 Mont. 197, 222 P.3d 626 (citing State v. Garner, 2001 MT 222, ¶ 22, 306 Mont. 462, 36 P.3d 346).

B. Mullarkey Did Not Present a Transcript of the November 5, 2008 Competency Hearing.

Under Mont. R. App. P. 8(2), the appellant has "the duty to present the supreme court with a record sufficient to enable it to rule upon the issues raised." This duty includes a duty to order and pay for relevant transcripts. Mont. R. App. P. 8(3), (5). District court minute entries may not substitute for transcripts. Giambra v. Kelsey, 2007 MT 158, ¶ 36 n.3, 338 Mont. 19, 162 P.3d 134 (citing Rolison v. Bozeman Deaconess Health Servs., 2005 MT 95, ¶ 32, 326 Mont. 491, 111 P.3d 202). Failure to present the court with a sufficient record on appeal may result in dismissal of the appeal or affirmance of the district court on the basis the appellant has presented an insufficient record. Mont. R. App. P. 8(2).

It is impossible for this Court, under the applicable standard of review, to determine whether substantial evidence supports the district court's findings, without having a record of and examining the evidence before the district court, the arguments made by the parties, and the court's comments, if any, about the evidence and arguments. See Giambra, supra, ¶ 36 n.3 (indicating that this Court cannot review an abuse of discretion argument if a transcript is not provided). Nor would it be fair to reverse the district court's rulings without thoroughly examining the complete record that underlay them. Cf. State v. Clark, 2008 MT 112, ¶ 24, 342 Mont. 461, 182 P.3d 62 ("it is fundamentally unfair to fault the district court for failing to rule correctly on an issue it never had the opportunity to consider").

The State is unable to meaningfully respond to, nor is the Court able to adequately review, Mullarkey's argument on this issue, because the record on appeal does not contain the necessary transcript of the evidence taken at the competency hearing on November 5, 2008. Consequently, this Court should dismiss this appeal as it relates to Mullarkey's challenge to the district court's finding that he was fit to proceed.

It should also be noted that Mullarkey steadfastly professed his fitness throughout the proceedings below, and specifically at the competency hearing, as evidenced by his proposed findings of facts. (D.C. Doc. 35 at 3-4.) Even if the Court should determine there was an adequate record to review the district court's findings of fact on this issue, Mullarkey has conceded it.

II. THE DISTRICT COURT CORRECTLY DENIED MULLARKEY'S MOTION TO DISMISS THE CHARGES AGAINST HIM, BASED ON THE REASONABLE PRETRIAL COMPETENCY EVALUATION AT MONTANA STATE HOSPITAL ORDERED UNDER MONT. CODE ANN. § 46-14-202.

A. Standard of Review

Questions of law and statutory interpretation are reviewed for correctness. State v. Tison, 2003 MT 342, ¶ 5, 318 Mont. 465, 81 P.3d 471 (citing State v. Meeks, 2002 MT 246, ¶ 15, 312 Mont. 126, 58 P.3d 167). This Court exercises

plenary review of questions of constitutional law, and reviews a district court's application of the Constitution to determine if it is correct. In re G.T.M., ¶ 9.

B. The Sole Basis for Mullarkey's Motion to Dismiss Was Violation of Mont. Code Ann. § 46-14-202 and Allegations Regarding § 46-14-221 are Not Properly Before this Court.

Despite Mullarkey's arguments on appeal, no violation of due process or statutory provisions that would relate to the application of Mont. Code Ann. § 46-14-221 is properly before this Court. Inexplicably, both the defense and the district court cited that statute in error in ordering Mullarkey's competency evaluation at the Montana State Hospital. (D.C. Docs. 20, 22.) But, § 46-14-221 applies only after a court has made a finding of unfitness and has committed a defendant for treatment and efforts to regain fitness. Here, despite the erroneous citation, it is undisputed that the district court never determined that Mullarkey was unfit or incompetent to stand trial, and that he was ordered to the Montana State Hospital for an evaluation of his competency, not for treatment to regain competency.

In addition, Mullarkey based his motion to dismiss solely on "violations of his fundamental right to due process and Section 46-14-202(2)." (D.C. Docs. 53, 54.) His proposed findings of fact regarding competence reflected that the evaluation was "pursuant to Section 46-14-201 et seq., MCA." (D.C. Doc. 35.) Any other basis for reversing the denial of his motion to dismiss would necessarily

be raised for the first time on appeal. The only issue properly before this Court, therefore, is whether the 98-day evaluation of Mullarkey's competency at the Montana State Hospital was a violation of due process and the provisions of Mont. Code Ann. § 46-14-202(2), which authorizes the district court to order such an evaluation "for a period not exceeding 60 days or a longer period that the court determines to be necessary for the purpose."

C. Mullarkey Acquiesced in the Competency Evaluation and In Its Duration.

The record is clear that Mullarkey acquiesced in and actively participated in any error that might have arisen by the duration of the evaluation. As a general rule, a party may raise on direct appeal only those issues and claims that were properly preserved by timely objection in the trial court. State v. West, 2008 MT 338, ¶ 16, 346 Mont. 244, 194 P.3d 683; see Mont. Code Ann. § 46-20-104(2). Beyond the mere failure to object, "acquiescence in error takes away the right of objecting to it." State v. Malloy, 2004 MT 377, ¶ 11, 325 Mont. 86, 103 P.3d 1064 (citing Mont. Code Ann. § 1-3-207). This Court "will not put a district court in error for an action in which the appealing party acquiesced or actively participated." State v. Micklon. 2003 MT 45, ¶ 10, 314 Mont. 291, 65 P.3d 559.

Here, the defense raised the issue of Mullarkey's fitness and moved for the evaluation. (D.C. Docs. 20, 21.) Within weeks of so moving, the defense requested a three-month continuance of the trial, as it was expected that Mullarkey

"will remain hospitalized for up to 90 days." (D.C. Doc. 24.) Once the State Hospital's report was filed, the district court held an omnibus hearing and then a competency hearing, at which Mullarkey made no objection to the duration of the evaluation or the fact that he would remain at the State Hospital for a few more days, until November 5, 2008. (D.C. Docs. 30, 33.) Of course there is no transcript of either one of those hearings in the record on appeal; therefore, there is no way to verify what, if any, discussion may have occurred regarding the nature or duration of the competency evaluation. See Mont. R. App. P. 8(2). Even after the competency hearing, Mullarkey still did not object to the duration of the evaluation, as evidenced by his silence on that issue in his proposed findings of fact. (D.C. Doc. 35.) Mullarkey acknowledged the purpose, timing, and specific dates of the evaluation, but did not object to it. (D.C. Doc. 35 at 2.)

Mullarkey should have objected at that time--or before--in order to preserve any constitutional or statutory error based on the court-ordered evaluation. Absent any timely objection, and given the evidence apparent in the record that Mullarkey acquiesced in the duration of the evaluation, this Court should reject his attempt now to raise those issues on appeal.

C. There Was A Rational Relationship Between The Nature And Duration Of The State Hospital Placement and Its Purpose For Evaluating Mullarkey's Competence.

To the extent that the district court's denial of Mullarkey's motion to dismiss is reviewable on the merits, this Court should affirm. The district court denied the motion because Mullarkey cited no authority for dismissal of the charges against him. While violation of § 46-14-221 expressly, and by this Court's precedent, see Tison, ¶ 15, requires dismissal of a criminal case for holding an unfit defendant longer than 90 days, there is no concomitant dismissal requirement under § 46-14-202. In fact, the latter statute, which is the applicable law in this case, provides that an evaluation may be for 60 days or longer if the court determines it to be "necessary for the purpose" of the evaluation. Mont. Code Ann. § 46-14-202(2).

Although the district court in this case did not expressly determine that 98 days was necessary for the purposes of Mullarkey's evaluation, such a finding could be implied. The doctrine of implied findings provides that where a court's findings are general in terms, any findings not specifically made, but necessary to the judgment, are deemed to have been implied if supported by the evidence. Williams v. State, 2002 MT 189, ¶ 26, 311 Mont. 108, 53 P.3d 864; State v. Wooster, 2001 MT 4, ¶ 18, 304 Mont. 56, 16 P.3d 409. Here the district court made a general order without specifying any particular time period, but the

circumstances indicate at least 90 days were intended or anticipated, and Mullarkey did not demand or object to any time period--at least not for over a month after the evaluation was complete, Mullarkey was back in jail, and the court had determined he was fit to proceed.

These same facts support the conclusion that Mullarkey's due process rights were not violated. This Court has repeated that it is "unconstitutional to indefinitely hold a person who is unfit to proceed without following the civil or criminal commitment procedures provided by state law; due process requires, at a minimum, some rational relation between the nature and duration of commitment and its purpose." State v. Tison, ¶ 11 (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)). Clearly in this case Mullarkey was neither unfit to proceed nor "indefinitely held," and the purpose of his competency evaluation was rationally related to its duration and nature. The record reflects that Mullarkey "appeared to have no difficulty adjusting to the ward environment and said he liked the food and reduced noise better here than in jail." (D.C. Doc. 28 at 5.) Furthermore, any additional time over 60 days was reasonably necessary--even if not originally anticipated--given Mullarkey's lack of cooperation with State Hospital staff and participation in the competency interview and assessment. (D.C. Doc. 28 at 6, 7-8, 11-12.)

The State does not dispute that Mullarkey's competency evaluation, ordered pursuant to Mont. Code Ann. § 46-14-202, extended beyond 60 days. However, the evaluation appears to have been reasonable under the statute and not violative of due process, because Mullarkey acquiesced in the actual period of time necessary to complete the evaluation and reach the determination of fitness to proceed, and because a finding could be implied that the time period was "necessary for the purpose" of the evaluation, as permitted by the statute.

III. THE DISTRICT COURT WAS NOT REQUIRED TO APPLY MONT. CODE ANN. §§ 46-14-311 & -312 IN ORDER TO LEGALLY SENTENCE MULLARKEY WITHIN STATUTORY PARAMETERS, BECAUSE MULLARKEY DID NOT CLAIM OR ESTABLISH THAT HE WAS SUFFERING FROM A MENTAL DISEASE OR DEFECT TRIGGERING THOSE STATUTES.

A. Standard of Review

This Court reviews a criminal sentence for legality only, considering whether the sentence falls within the parameters set by the applicable sentencing statutes. State v. Gallmeier, 2009 MT 68, ¶ 11, 349 Mont. 424, 203 P.3d 852. The Court reviews a district court's determination of the existence of mental disease or defect under Mont. Code Ann. § 46-14-311 to determine whether the court has abused its discretion. Gallmeier, ¶ 11.

B. Mullarkey Has Not Met His Burden to Show that He Suffered from a Mental Disease or Defect Requiring Consideration at Sentencing.

Mullarkey argues the district court erred by sentencing him without consideration of "Mullarkey's mental illness" as required, he says, by Mont. Code Ann. §§ 46-14-311 and -312. (Br. of Appellant at 29-32.) Mont. Code Ann. § 46-14-311(1) provides:

> Whenever a defendant is convicted on . . . a plea of guilty . . . and claims that at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or defect . . . that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence that it considers necessary for the determination of the issue . . . .

If such a mental disease or defect is found, then the court "shall sentence the defendant to be committed to the custody of the director of the department of public health and human services . . . for a definite period of time not to exceed the maximum term of imprisonment" under ordinary criminal sentencing statutes. Mont. Code Ann. § 46-14-312(2). On the other hand, if such a mental disease or defect is not found, the court sentences the defendant under ordinary criminal sentencing statutes. Mont. Code Ann. § 46-14-312(1).

The defendant has the burden of proving to the satisfaction of the trial court that he or she was suffering from the type of mental disease or defect defined in

section 46-14-311. State v. Tibbitts, 226 Mont. 36, 41, 733 P.2d 1288, 1291 (1987). The fact that a defendant has been diagnosed as suffering from a mental illness is insufficient to meet the statutory standard if there is no evidence that the mental illness rendered the defendant unable to appreciate the criminality of his or her behavior or conform his or her behavior to the requirements of law. State v. Smith, 2000 MT 57, ¶¶ 21-24, 299 Mont. 6, 997 P.2d 768 (citing State v. Watson, 211 Mont. 401, 686 P.2d 879 (1984)).

Mullarkey has never claimed that he suffered from a mental disease, defect, or illness. (See, e.g., D.C. Docs. 8 at 3, 13, 35 at 3-4, 37 at 4-5, 86; 5/11/09 Tr. at 8-9, 60, 64, 68.) There was no evidence presented at trial--and Mullarkey has not set forth or cited any such evidence in his brief on appeal, see Mont. R. App. P. 12(1)f--that Mullarkey suffered from a mental illness or that any such condition rendered Mullarkey unable to appreciate the criminality of his behavior or to conform the behavior to the requirements of the law. It is true, in the context of Mullarkey's competency to stand trial, two experts opined that Mullarkey suffered from a mental disease or defect, but Mullarkey consistently disputed that diagnosis, even as late as sentencing. As cited above, however, such diagnosis alone is insufficient to satisfy the statutory standard.

Not only has Mullarkey raised this issue for the first time on appeal--and in doing so completely reversed and abandoned the position that he was not mentally ill, which he consistently asserted below--but he has failed to bear his burden to show that any mental illness had the effects required for application of the pertinent statutory provisions. Once the district court determined that Mullarkey was competent to stand trial, whether or not Mullarkey suffered a mental disease or defect was no longer an issue in this case. Mullarkey's trial and sentencing proceeded without Mullarkey claiming or establishing a mental disease or defect requiring consideration in his sentence. See State v. Hill, 2000 MT 308, ¶ 28, 302 Mont. 415, 14 P.3d 1237 (defendant failed to place mental state directly at issue by alleging the existence of a mental disease or defect). Because no mental disease or defect as set forth in Mont. Code Ann. § 46-14-311(1) was either claimed or established by Mullarkey, the district court legally sentenced him, within statutory parameters, under the ordinary criminal sentencing statutes. Mont. Code Ann. § 46-14-312(1).

CONCLUSION

This Court should affirm the district court's orders, judgment, and sentence entered against Mullarkey for assaulting and obstructing peace officers.

Respectfully submitted this 23rd day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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